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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1958

No. [redacted]705

BERT RUUD and EMMA RUUD,

PETITIONERS

VS.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Idaho Falls, Idaho

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Idaho First National Bank Building
Idaho Falls, Idaho

The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on March 18, 1958.

OPINIONS BELOW

The opinion of the District Court for the District of Idaho is reported at (R. 20). The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. (R. 426)

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 USCA Sec. 1358 and 28 USCA Sec. 1291.

QUESTIONS PRESENTED

In an action for condemnation, instituted by the United States, the Trial Court ruled that farmers, as a class, are incompetent to testify as to the highest and best use to which the farm lands could be put. The Trial Court further ruled that farmers, as a class are incompetent to give an opinion as to the fair market value of the lands involved. The Court of Appeals affirmed, saying that the ruling of the Court was error, but that counsel for landowners should have furnished citations to the Trial Court during recess showing an erroneous ruling. Failure to furnish citations "lulled the Trial Court' into a sense of security. The questions presented are:

1. Whether experienced farmers, living in the vicinity of the lands being taken under condemnation, who are familiar with the land and its capabilities, and the values of land in the vicinity are competent to give an opinion as to the highest and best use to which the lands could be put at the time of condemnation.

2. Whether experienced farmers, living in the vicinity

of the lands sought to be condemned and who are familiar with land values are competent witnesses to give an opinion as to the fair market value of the premises condemned.

3. Whether the rulings of the Trial Judge, excluding testimony of experienced farmers as a class because they were not "experts on appraising real estate" is subject to review by Appellate Courts.

4. Whether counsel, during a trial, subsequent to the Trial Court sustaining an objection as to a witness, is required to submit authorities to the Trial Court showing an incorrect ruling as a matter of law.

5. Whether or not the Circuit Court can assume that counsel did not attempt to persuade the Trial Court that its ruling was erroneous, after the ruling had been made.

6. Whether the Trial Court erred in refusing to grant appellants a new trial after excluding testimony of such witnesses.

STATEMENT

For purposes of this opinion, we accept the facts stated by the Circuit Court in its opinon below (R. 426):

> "An action for condemnation of three parcels of land in Idaho belonging to appellants was brought by the Government. There is but one question of importance raised. The Trial Court refused to allow certain farmers who testified that they were well acquainted with the parcels of land and that they knew the farming practices in the vicinity and the value of lands in the particular neighborhood, to give opinions either as to the highest and best use to which the parcels could be put on the date of taking or as to the fair market value of the lands involved in the action on the date of taking. The Government objected to the evidence on the ground that the witnesses had not been qualified as experts on appraising real estate. "The court ruled that the particular witnesses could not give opinions on such subjects unless qualifications of such witnesses were shown in connection with making an appraisal of land. In other words, the Trial Court required every witness, before giving an opinion as to the highest and best use or the fair market value of the particular property in issue, to be qualified as an expert real estate appraiser. This was error."

A motion for a new trial, based upon this erroneous ruling was addressed to the Trial Court. The motion was denied (R. 20).

The ruling of the Trial Court was affirmed by the Court of Appeals for the Ninth Circuit, by a divided court. The

Court of Appeals, in the majority opinion, admitted the ruling of the Trial Court was erroneous, but stated: "The circumstance which is most persuasive against appellant is that the Trial Judge offered on the day when these witnesses first testified to consider the offer of counsel or appellant to furnish citations with respect to the qualifications of each of such witnesses . . . The record is devoid of showing that appellant produced any such authorities. . .

" . . . in this situation appellant lulled the Trial Court into inaction. It was incumbent upon him to raise the point in such a way that the Trial Judge knew that his ruling was definite and that appellant had not waived the point." (R. 429)

". . . The Trial Court could as a matter of administrative convenience have refused to have further opinions as to highest and best use or fair market value. Such a ruling would have been sustained."

The dissenting opinion states in summary that the trial court had made its ruling, the ruling was final and there should be no requirement that counsel, aggrieved by the ruling, should present for the record an affidavit showing attempts made by him to subsequently change the opinion of the Trial Court. The dissenting opinion further pointed out that the Trial Court had the right to limit the number of witnesses; however, it had not exercised this prerogative.

REASONS FOR GRANTING THE WRIT

By holding that the Trial Court committed error in refusing to permit the farmers to give an opinion as to highest and best use, and as to fair market value, the jury was denied the right of considering the opinion of these witnesses. The United States, as a party, in a Federal Court, is then permitted to have the opinions of its witnesses submitted to the jury, while qualified witnesses for landowner are not permitted to be heard by the jury.

The decision is in conflict with the decision of this Court in the case of Montana Railway Co. vs. Warren, 137 U. S. 348, 354, holding that farmers living in the vicinity of a farm whose value is in question may testify as to its value.

The decision is in conflict with rulings of the Tenth Circuit, Platt vs. Western Airlines reported in 155 Fed. (2d) 850, holding that where the Trial Court applies erroneous principles of law in excluding testimony, the Appellate Court will reverse. Germania Life Insurance Co. vs. Ross-Lewin (Colorado 51 Pac. 488 at 492; Meiselman vs. Crown Heights Hospital (New York) 34 NE (2d) 367; Delaney vs. Morris (Okla.) 145 Pac. (2d) 936.

The decision is in conflict with the holdings of the Supreme Court of the State of Idaho, wherein the land is located, as shown by Idaho Western Ry. Co. vs. Columbia etc. Synod, 20 Idaho 568, 119 Pac. 60, holding qualified farmers are permitted to produce evidence as to highest and best use and as to fair market value.

The decision ignores the mandate of Rule 43 a, Rules of Civil Procedure, requiring evidence to be admitted which is

admissible under the laws of the United States, or Courts of United States, or Courts of General Jurisdiction in the state in which the United States Court is held.

The decision ignores the many rulings of this Court and of other Circuit Courts to the effect that the landowner is entitled to submit evidence as to the highest and best use to which the property could be put, as pointed out in the cases of U. S. vs. Powelson, 319 U S. 266, Atlantic Coast Line R. Co. vs. U. S. 132 Fed. (2d) 855; McCandless vs. U. S. 298, U. S. 342.

The reasoning of this court in the case of McCandless vs. U. S. 298, U. S. 342, 80 L. Ed. 1205 is particularly applicable to this case. The Court stated: "An erroneous ruling which relates to the substantial rights of a party is grounds for reversal, unless it affirmatively appears from the whole record it was not prejudicial . . . in an eminent domain proceeding, the vital issue is just compensaton. The proof here offered necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down by the Olsen case (citing). To exclude from consideration of the jury evidence of this elementary character could not be otherwise than prejudicial."

We are unable to find any law requiring the counsel for petitioner to have attempted to persuade the court to change its ruling after the recess for the day. The court had made its ruling and the uling was final. We respectfully submit that counsel, after a ruling of the Trial Court, should not be compeled to attempt to persuade the court at recess to change its ruling and then present for the record an affidavit showing the extent of his efforts to cause the court to reverse its decision. The dissenting opinion in the Circuit Court pointed out that

there was no attempt made on the part of the Trial Court to limit the number of witnesses. There is no ruling to this effect in the record. Although it was discussed by the majority opinion as a grounds for their position, the record does not provide any showing where the Trial Court attempted to sustain its position on the grounds of excessive number of witnesses. The decision of the Trial Court was based strictly as a matter of law upon the competency of farmers to testify as to highest and best use and fair market value. This admittedly was erroneous.

The point becomes of paramount importance to appellant's case when considered in the light of witnesses produced by the Government. They were Mr. Dick, Manager of an Irrigation District and real estate salesman (R. 32), Mr. Gourley, auctioneer and banker (R. 124), Mr. Newell, a farmer, residing some 400 miles from the land condemned, who was the only farmer permitted to give an opinion as to the highest and best use and fair market value (R. 152). The witnesses for appellant were residents of the immediate area and best qualified to give an opinion as to highest and best use and fair market value.

The testimony in the action conclusively shows that the Palisades Dam had been authorized in 1941, reauthorized in 1950; that appraisers for the United States had been present and visited farmers from 1946 on; that the farm lands in question were thrown out of proper crop rotation due to uncertainty of petitioners in knowing how long they would be able to retain their lands. The yields of the lands at times of Government appraisals in 1955 were not truly representative of land capabilities. The Government appraisers based their figures on production at the time of the condemnation, despite uncontradict-

ed testimony that the lands were not being put to their highest and best use due to Government interference.

The petitioners were denied the right of showing by persons best qualified to give their opinion to the jury, what the land was best suited for, and their opinion as to land value. The petitioners should not be compelled to accept an award of "just compensation" based on this record.

A new trial should be granted in a case where the ends of justice so require and to prevent a miscarriage of justice. We respectfully submit that the rejection of this basic evidence could not be otherwise than prejudicial.

CONCLUSION

The ruling of the Trial Court has deprived the petitioners of the opportunity to secure just compensation guaranteed them by Federal and State Constitutions. The rulings inject uncertainty and inconsistencies into the trial of an eminent domain proceeding and deprive petitioners of their right to prove the issue of highest and best use and just compensation. This petition for a Writ of Certiorari should be granted.

Respectfully submitted,

William S. Holden

Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERT RUUD and EMMA RUUD,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee

No. 15,546
Mar. 18, 1958

Upon Appeal from the United States District Court

for the District of Idaho

Eastern Division

Before: HEALY, POPE and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

An action for condemnation of three parcels of land in Idaho belonging to appellants was brought by the government. There is but one question of importance raised. The trial court refused to allow certain farmers, who testified they were well acquainted with the parcels of land and that they knew the farming practices in the vicinity and the value of lands in the particular neighborhood, to give opinions either as to the highest and best use to which the parcels could be put on the date of taking or as to the fair market value of the lands involved in the action on the date of taking. The government objected to the evidence on the ground that the witnesses had not been qualified as experts on appraising real estate.

The court ruled that the particular witnesses could not give opinions on such subjects unless qualifications of such witnesses were shown in connection with making an appraisal of land. In other words, the trial court required every witness, before giving an opinion as to the highest and best use or the fair market value of the particular property in issue, to be qualified as an expert real estate appraiser. This was error.

A farmer, who knows the property, knows the farming practice in the vicinity and the values of land in the neighborhood, is competent to give such opinions.[1] The mere fact that he does not himself make land valuations or buy and sell lands as a business is not a disqualification.

It only remains for us to determine whether or not any prejudice to appellant appears from these rulings. Both the

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[1] "It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value * * *." Montana Railway Co. vs. Warren, 137 U. S. 348, 354.

witnesses in question, Ellsworth and Smith, were farmers. Ellsworth was not permitted to state what, in his opinion, was "the highest and best use to which" the ranch "could be put." Smith was not permitted to state his opinion as to the highest and best use to which the land could be put. Further, the latter was prevented from giving his opinion of the fair market value of the property.

It must be remembered that an attempt had been made to qualify each of these witnesses as competent to give an opinion as to value and best use. If the court had gone no further than to say that neither had sufficient qualifications to testify, the ruling would have been within its discretion.[2] The circumstance which is most persuasive against appellant is that the trial judge offered on the day when these witnesses first testified to consider the offer of counsel for appellant to furnish citations with respect to the qualifications of each of such witnesses. At that time, Smith had testified and these opinions had been ruled out. Ellsworth was on the stand when the offer was made by counsel.

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[2]"Value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject * * * It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of the matter rests largely in the discretion of the trial judge." Montana Railway Co. vs. Warren, 137 U. S. 348, 353. See also Love vs. United States, 8 Cir., 141 F. 2d 981, 983, and cases there cited.

The entire colloquy is set out in the footnote.[3]

The record is devoid of showing that appellant produced any such authorities. In fact, it is clearly shown that the ques-

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"A. Yes, sir.

"Q. Would you state to the jury just what that opinion is?

"Mr. Furey: Just a moment. I'll object to that question, Your Honor, on the grounds that this witness hasn't been qualified as an expert on appraising real estate.

"The Court: I'll have to sustain the objection, Mr. Holden.

"Mr. Holden: Your Honor, we aren't qualifying him as an expert, but as a man who has been engaged in farming over the years, sixty-some odd years, familiar with land values in Bonneville County, particularly in Swan Valley, Grand Valley and Alpine, and who has discussed values with farmers and who has checked production of crops in the area and one familiar with valuations.

"The Court: I can't change my ruling unless you can show qualifications in connection with making an appraisal of land.

"Mr. Holden: Your Honor, I would be very happy to furnish — I don't have it right here — I would be very happy to furnish citations with respect to qualifying one familiar with lands in the area, one who lives in the area, and the question would be with respect to where he might reside with reference to this

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"[3] Q. Now, as a result of your experience as a farmer and your knowledge of lands in the area of the Ruud ranch, and taking into consideration just what you did in connection with making your appraisal, do you have an opinion as to the highest and best use to which the Ruud home ranch, Tract Number 41, could be put March 4, 1955?

ranch.

"The Court: Well, during the evening, if you can show me where the Court is wrong, I will be very glad to change my ruling, but I will have to sustain the objection now the way I understand the law.

"Mr. Holden: Then may we reserve the right?

"The Court: Yes, you may.

"Mr. Holden: That is all for the moment.

"The Court: Call your next witness.

"D. WORTH SMITH called as a witness by the defendant, having been first duly sworn, testifies as follows:

"Direct Examination

"By Mr. Holden:

"Mr. Holden: Now, Your Honor, with respect to Mr. Smith, Mr. Smith lives right across from the Ruud ranch, and counsel, and has lived there for some forty years. He will testify that he is familiar with land values, ranch land, and those values in the area. Now, we don't intend to qualify him as an expert appraiser.

"The Court: I would have to make the same ruling.

"Mr. Holden: And he is familiar with productivity of the soil in the area—

"The Court: — Oh, well, I will let him testify as to all those matters. If you wish to question him with regard to other things, the soil and things of those kind.

"Mr. Holden: I'll interrogate him up to that point if I may. On the other point I would use the same authorities as on the other witness."

tion was never raised in any form again. Worth Smith testified as to the productivity of the land, soil conditions thereon, water supply and crops. Adjournment was taken. Court reconvened the next day Smith continued with similar testimony. He was never asked the questions claimed to be crucial on this appeal. Immediately after he left the witness stand, Preston Ellsworth was recalled. He reiterated and enlarged upon his previous testimony as to soil conditions and crops. He testified that the principal crops in the area are alfalfa, wheat, barley and oats. He was not asked to give an opinion about anything.

There was no offer of proof as to either of these witnesses. While it cannot be said that the failure to make an offer of proof is always fatal, in this situation appellant lulled the trial court into inaction. It was incumbent upon him to raise the point in such a way that the trial judge knew that his ruling was definitive and that appellant had not waived the point.

There was a real reason why appellant did not go further. The testimony was purely cumulative. Under the conditions, the trial judge could as a matter of administrative convenience have refused to have further opinions as to the highest and best use or fair market value. Such a ruling would have been sustained.

The government called three witnesses as to "highest and best use" and as to fair market value. Defendant called four who were permitted to testify on these subjects and, in addition, Ellsworth and Smith, who were not. If appellant had asked for a pretrial conference, it is probable the court would have limited the number of experts to three on a side.[4] And the judge might

[4]See Rule 16, Federal Rules of Civil Procedure, 29 U. S. C. A.

have placed that same limitation after the United States had called three witnesses only.[5] Instead, the trial court allowed appellant four and refused to hear opinion testimony from the two remaining, as has been noted.[6]

There is another method of determining that the opinions of the two additional witnesses would not have affected the result. The opinion of values to which each witness testified is set out below:

Witnesses of government:	
Dick	$165,769.90
Gourley	166,950.00
Newell	171,400.00
Witnesses of appellant:	
Groberg	$249,350.00
Cook	255,460.25
Naegle	252,503.00
Ruud	299,810.00

[5]"There can be no doubt of the power of the trial court, in the exercise of a sound and reasonable discretion, to limit the number of expert witnesses to the issue of value." Chapman vs. United States, 10 Cir., 169 F. 2d 641, 642-643, cert. den., 335 U. S. 860.

[6]The reliance of appellant on McCandless vs. United States, 298 U. S. 342, is misplaced. There the trial court, in a condemnation action, erroneously excluded all evidence adduced as to the highest and best use to which the land could be put if irrigation water were available. In the instant case, all witnesses except Smith and Ellsworth were permitted to testify freely to the highest and best use of the land in question.

It is obvious that further opinions would not have changed the verdict.

But appellant claims that, since Newell, a government witness, was a farmer and his figure of value, $171,400.00, was accepted by the jury as a basis for the verdict, appellant was entitled to have farmers Ellsworth and Smith also give their opinions. Newell was not only a farmer, but a technically trained real estate appraiser. There is no doubt he was an impressive witness. But Naegle, one of the witnesses for appellant, was not only a qualified real estate broker, but he was a farm owner participating in share crops with his renter. Groberg also was a witness for appellant. He was a qualified real estate broker and appraiser. He was also the operator of a farm near Idaho Falls. In addition to these, Ruud himself, as owner, was permitted to give an opinion of fair market value based upon the highest and best use. It is notable that this figure of $299,810.00 was the highest given by anyone. Perhaps the jury considered this circumstance. In any event, the trial court had several grounds upon which to exclude the opinions of the final witnesses, any of which would have been well founded. The mere fact that he sustained the objection, made upon a technically erroneous ground does not call for reversal. Appellant waived the error as noted.

Besides, the trial was fair and impartial. The jury was not swayed by passion and prejudice. They chose a figure supported by the testimony of one who was a farmer and experienced real estate appraiser. This was considerably higher than the government offer. It was the highest figure to which a government witness testified. Appellant may have hoped for a split between the highest government figure and the lowest opinion for the

landowner, as many attorneys for landowners do. But the verdict was supported by substantial evidence[7] and there was no prejudice to appellant by the erroneous rulings.[8]

Affirmed.

POPE, Circuit Judge, dissenting.

We are all agreed that the ruling of the court refusing to permit the farmer witnesses to testify as to the value of the land was error. That it was prejudicial error cannot be doubted. For as anyone who has lived in a farming area knows, the average juror in such a locality is apt to have a higher regard for the views of a dirt farmer than for the opinions of those whose ideas of land values are accumulated in a swivel chair or by driving past a few ranches.

The suggestion that appellants waived their point or "lulled the trial court into inaction" by failing to hand the judge citations will not bear analysis. When the citations were mentioned the judge had made his ruling, it was final, and there

[7] "* * * the jury heard the conflicting testimony by qualified experts on both sides, and reached a finding which is supported by substantial evidence. Since the question of credibility is for the District Court and the award is within the range of the testimony, the award cannot be set aside on appeal." Simmonds vs. United States, 9 Cir., 199 F.2d 305, 307. See also Love vs. United States, 8 Cir., 141 F2d 981, 982; Miller vs. United States, 3 Cir., 137 F.2d 592, 594.

[8] "On the hearing of any appeal * * * the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U. S C. A. p. 2111. See also Rule 61, Federal Rules of Civil Procedure, 28 U. S. C. A.

was no reservation about it. The only thing discussed was a possible effort to get the judge to change his mind. No rule I have ever heard of requires a lawyer to furnish citations under such circumstances. A judge is presumed to know the law. Most records reviewed by this court fail to show whether the trial judge was furnished one or a dozen or any citations. His rulings are reviewed nevertheless. Furthermore, the judge mentioned the evening as the time to bring the citations. I do not know that counsel did not go to the judge's office or home that evening with citations. Whether he did or not is immaterial, but to expect the lawyer to file an affidavit that he had done so seems to me to require something unheard of. All this sounds to me like a suggestion that the trial court could say to appellant: "It is your fault for not making me change my mind."

Just as irrelevant, in my view, is the suggestion that there might have been a pre-trial hearing at which the number of opinion witnesses might have been limited. That was not done; no such order was made; that was not the basis for the ruling, and for this court in effect retroactively, and at this stage, to apply such a limitation to appellant, is highly unjust to this litigant.

Of course this was an extended trial. That such prejudicial and plain error should occur is unfortunate. But the only way this court can do its duty as an appellate court is to impose the legal consequences of error.

(Endorsed:) Opinion and Dissenting Opinion. Filed Mar. 18, 1958. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERT RUUD and EMMA RUUD,
Appellants,
VS.
UNITED STATES OF AMERICA,
Appellee.
No. 15,546

JUDGMENT

Appeal from the United States District Court for the District of Idaho, Eastern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Idaho, Eastern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: March 18, 1958

PAUL P. O'BRIEN, Clerk